United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1302

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75 - 1302

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JACK GALLO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

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No. 75 - 1302

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JACK GALLO,

Defendant-Appellant

BRIEF FOR APPELLANT JACK GALLO

Preliminary Statement

Jack Gallo appeals from a Judgment of Conviction rendered on August 1st, 1975 in the United States District Court for the Eastern District of New York, after a four-day trial before the Hon. Orrin Judd, United States District Judge, and a jury.

Appellant was charged by Indictment No. 74 CR 822 with nine counts of violating Title 18, United States Code, Section

659. The jury convicted Callo of seven counts and found him not guilty on the remaining two counts.

On August 1st, 1975 Hon. Orrin Judd sentenced the Appellant to a sentence of one year imprisonment on each count, the sentences imposed to run concurrently. The Appellant is currently at liberty on bail pursuant to the terms of a stay of execution of judgment granted by Judge Judd.

The Indictment appears on page five of Appellant's Appendix.

STATEMENT OF THE FACTS

The theft of shipments of blank airlines tickets from both Pan American Airways and Wings and Wheels, an express carrier, resulted in the entry of 7,000 stolen airlines tickets into the market. The thefts from Pan American involved tickets bound for shipment to Los Angeles, California,[1] Port-au-Spain, Trinidad,[2] and Fairbanks, Alaska. As a result of these thefts,

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[1] The Los Angeles-bound tickets were reported missing in New York on April 27th, 1973. (T 40) From a shipment of 18,000 blank tickets, 1,400 were found missing. (T 40)

[2] The tickets bound for Trinidad were stolen on February 20th, 1973, although they were not reported as stolen until May 2nd, 1973. (T 47)

Pan American assigned its Director of Fraud Prevention, Morris J. Fitzgerald, to investigate the thefts.[3]

The tickets which were taken from Wings and Wheels were tickets printed by the Rand McNally Company under contract for the Airline Traffic Conference of America (ATC). These tickets are pre-numbered but devoid of airlines names and are stored at plants in Nashville, Tennessee and Ossining, New York. Upon receipt of a requisition from ATC, the tickets would be shipped out. A portion of tickets, numbers 1455301 through 1455500, as well as 50 additional tickets under a miscellaneous charges order, was sent to the Odyssey Travel Agency in Old Bridge, New Jersey and were shipped on February 21st, 1973 via Wings and Wheels, an ATC authorized carrier. (T 73 - 74)

On April 12th, 1973, Rand McNally sent 1,000 tickets, numbers 3865101 through 3866100, and 500 tickets, numbers 8241801 through 8242300, to Greenwold Travel Service in Clifton, New Jersey via Wings and Wheels. (T 77 - 78) Neither shipment arrived at its destination. (T 80) The tickets destined

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[3] Mr. Fitzgerald did not learn of the loss until April 26th, 1973. (T 47)

for the Odyssey Travel Agency and for the Greenwold Travel Service disappeared sometime subsequent to their arrival at Newark Airport. (T 92) They were probably taken from the Wings and Wheels warehouse in Newark. (T 134) The fact that the two shipments arrived in Newark but then subsequently disappeared, was uncovered on the same day each shipment was made. (T 145)

The reporting of these, as well as two additional thefts,[4] brought the Federal Bureau of Investigation into the case in June, 1973. Agent Michael Rigolizzo was assigned to investigate the theft of these tickets. (A 23)[5] Once having determined the nature and scope of the theft and having recovered 1,500 - 2,000 tickets (A 26), Agent Rigolizzo attempted to interview the individuals who had actually used the tickets.

In addition to interviews with the ticket users, Rigolizzo sought and obtained handwriting exemplars from the Appellant.[6]

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[4] Pan American tickets scheduled to be shipped to Fairbanks, Alaska and a Wings and Wheels delivery of tickets for Bayonne, New Jersey.

[5] The letter "T" refers to the trial transcript, while references to the letter "A" refer to the Appellant's Appendix.

[6] Jack Gallo voluntarily appeared at the United States Attorney's office on two or three separate occasions. (A 30 - 31, T 415) On each occasion, he was asked to and provided in excess of 50 exemplars at a sitting. (T 407 - 408, 412)

Agent Rigolizzo then sent all of the tickets which had been recovered and Gallo's handwriting exemplars to Washington, D.C. for F.B.I. laboratory analysis. The latter concluded that 427 of the stolen tickets had been filled out by the Appellant. (A 28) This testimony, concerning Gallo's connection to airlines tickets not pleaded in the Indictment, was later admitted at trial over the strenuous objection of defense counsel who contended that evidence of these uncharged crimes was so prejudicial to a fair trial that the harm to the defense far outweighed the probative value of admissibility. (A 11 - 21) The Trial Judge ruled in favor of admissibility noting:

> "Deaton [United States v. Deaton, 381 F.2d 114 (2nd Cir., 1967)] goes pretty far, Mr. Washor [defense counsel]. . . If it is relevant then the government is entitled to get it in." (A 11)

THE TRIAL

Morris J. Fitzgerald, the Director of Fraud Prevention for Pan American World Airways (T 15), testified he was assigned to investigate airline ticket thefts when a shipment of blank tickets bound for Port-au-Spain, Trinidad did not arrive at their destination and later turned up used. (T 17) The printed unit price of each ticket prior to its use and the point of

shipment is $.02. (T 36a, 37, 55) He identified the tickets as those enumerated in count two of the Indictment. According to Mr.Fitzgerald, the value of an airline ticket is whatever the face is when the ticket is filled out. (T 21) Thus, one could return an unused ticket and demand a cash refund equal to the face value of the ticket. (T 58)

At trial, Fitzgerald was shown four additional tickets, numbers 602727, 602728, 602729 and 602730, which were written for round trips from New York - Bermuda and New York - Miami - New York. These tickets were marked as Government Exhibit "4" and were applicable to count three. These tickets were stolen while en route from New York to Trinidad. (T 24) Each ticket was valued in excess of $250.00. (T 23)

Fitzgerald identified additional tickets for trips from Hong King to Honolulu, Hawaii and New York to Tokyo and Tokyo to Hong Kong as those which were part of a shipment to Pan American's Los Angeles ticket office. (T 25) Each ticket had a face value of $2,289.80 (T 25, 29) and were made out to "Mr. L. Truscio." (T 26) The tickets were validated in New York on May 24th, 1973. (T 29)

In addition, Mr. Fitzgerald identified ticket numbers

862, 863, 865, 866, 867; three round trip tickets from New York to Dublin, Ireland's Shannon Airport made out to Mr. & Mrs. C. Curzio, Mrs. M. McClusky, Master B. Curzio, Master M. Curzio and Ms. D. Curzio. Each adult ticket (nos. 862, 863 and 864) was valued at $415. (T 30) The children's tickets (nos. 865, 866 and 867) were valued at $209. (T 31) These six tickets had likewise been stolen from the shipment of air-line tickets bound for Trinidad. (T 30)

It is impermissible and illegal for Pan American tickets to be sold for less than the face value as marked on the ticket.

Fitzgerald conceded that by merely looking at Exhibits "3-A", "3-B", "4-A", "4-B", "4-C" and "4-D" one could not determine that they were at all improper. (T 52, 64)

George Zackaroff, an employee of Wings and Wheels Air Express International, testified that Wings and Wheels handle Rand Mc Nally's air freight shipments. (T 115)

Wings and Wheels reported the shipment destined for Greenwold Travel Service missing on April 26th, 1973. (T 124) The tickets disappeared sometime after their arrival in New York and prior to scheduled delivery at Newark Airport. (T 125)

Both thefts took place from the custody of Wings and

Wheels after possession had left the airline and no longer in an air terminal or air navigational facility. (T 147)

William S. Oberg, a special F.B.I. agent employed as a document examiner, testified that the bogus tickets used by Wendy Glen and family had been written by Jack Gallo. (T 420 - 421) These tickets had been introduced as Government Exhibits "10-A", "10-B" and "10-C". (T 429 - 430) The stolen tickets which served as the basis of count six in the Indictment, were written by the Appellant. (T 444) The tickets which formed the basis of count two (Government Exhibits "3-A", "3-B", "3-C", and "3-D"), were utilized when Gallo took the Serrano's to Puerto Rico and filled out in Gallo's handwriting. (T 445 - 446)

A comparison of the tickets upon which count three was predicated, the tickets used by the Flaums, was not prepared in Gallo's handwriting. (T 446) The tickets utilized by Larry Truscio on his honeymoon trip to the Orient (counts five and six) were written by the Appellant. (T 446 - 447) Likewise, the tickets utilized by Mr. & Mrs. I. Gallina, which were basis for count seven (Government Exhibits "13-A" and "13-B") were prepared by Jack Gallo. (T 447) The tickets bearing the names "Mr. & Mrs. J. Bruno" (Government Exhibit "15")

upon which count eight was based, were not written by Jack Gallo. (T 447 - 449)

The tickets provided for Mr. & Mrs. Milrod's trip to the West Coast (Government Exhibits "14-A" and "14-B") were written by Jack Gallo,[7] but the tickets which the Corzio family attempted to utilize for their trip to Ireland were not. (T 449 - 450)

Although the Government's handwriting expert was unable to definitively conclude that Government Exhibit "24", the registration form at Puerto Rico's El San Juan Hotel, was prepared by Jack Gallo, Government Exhibit "26" had been prepared by Gallo. (T 450 - 451)

Agent Oberg was unable to conclude that the two airline tickets used to transport Cheryl Pellegrino and Gallo to Jamaica were written by Gallo. (T 511 - 512) The tickets appeared to be written by someone else. (T 515)

THE ACCOMPLICE

Lawrence (Larry) Truscio, the owner of the Tom Jones Beauty Parlor and an alleged admitted accomplice of the Appellant,

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[7] Agent Oberg's preliminary hypothesis of the handwriting on the Milrod tickets was inconclusive. (T 509) Later exemplars caused Oberg to conclude that the tickets had been prepared by Gallo. (T 510)

testified that he knew and had dealings with Hilda Hoffman. (T 248) He obtained airline tickets at discount for her. (T 249) He was always paid in cash. (T 250) All of the stolen tickets which he sold at discount were supplied by the Appellant Jack Gallo. (T 251, 254 - 255, 257)

Truscio claimed that the Appellant approached him and mentioned that he could obtain airlines tickets at discount. Should Truscio hear of air travellers interested in purchasing tickets at a discount, he knew to place a call to Jack Gallo. (T 258) On the one occasion when Truscio questioned Gallo's ability to obtain the tickets at discounted prices, Gallo's sole response was a smile. (T 259, 310)[8] Truscio never probed any further. (T 260)

Truscio himself used Gallo's bogus tickets. Jack Gallo gave Truscio a wedding present of two first-class round trip airlines tickets to the Orient. (Government Exhibits "5-A", "5-B", "5-C" and "5-D"; T 262) The tickets, given as a wedding gift, had a face value of approximately $8,500. (T 264 - 265)

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[8] During cross-examination, it was revealed that Truscio could not recall such an incident while testifying before a Grand Jury. (T 344)

Truscio knew they were stolen. (T 274)

Over defense objection, Truscio was permitted to testify that on occasions other than those alleged in the Indictment, he sold Gallo's discounted airlines tickets to others. (T 266) Judge Judd ruled that the question had a bearing on the relationship between Truscio and Gallo and so he permitted it. (T 266) The arrangement between Truscio and Gallo went on for "around a year", but Truscio was unable to recall how many tickets were actually sold. (T 267 - 268) The arrangement consisted of Gallo supplying the tickets at between 50 and 55 per cent of face value, while Truscio sold them at 70 to 75 per cent of face value. (T 268) Under their arrangement, Truscio made money on each transaction. He did not know, however, if his customers knew that he was profiting from this service. (T 269)

Truscio conceded on direct examination that he had previously been convicted of "stolen tickets" within the Eastern District of New York in connection with the sale of tickets supplied by Jack Gallo. (T 270 - 271) The tickets would be picked up at Gallo's business which was located on Kings Highway and West 10th Street in Brooklyn. (T 271) He had

been under indictment for perjury before the Grand Jury, but the Government dismissed the indictment prior to Truscio's appearance before the Federal Grand Jury as a Government witness late in 1974. (T 281 - 282) At the first Grand Jury appearance, Truscio denied, under oath, that he obtained airlines tickets from Gallo. Once he agreed to testify to "the truth," that he did obtain the tickets from Gallo, the indictment was dismissed. At the time, Truscio pleaded guilty to possession of stolen airlines tickets before Judge Platt, he did not mention that Gallo had supplied him with the tickets. (T 319)

Truscio conceded he became aware of Detective Curzio's inability to use his discounted tickets on his trip to Ireland. (T 288) Although Truscio had been paid, through Altman, for the tickets, Truscio was never asked for a rebate for the tickets. (T 289)

Although Truscio paid Gallo about 50 per cent of the proceeds obtained from Curzio, and kept 25 per cent for himself, he never alerted Gallo to the problem which developed with Curzio's tickets. (T 294 - 295)

Truscio had never provided the Government with handwriting

exemplars. (T 295)

Truscio made other trips beside the honeymoon trip to the Orient on Gallo's tickets. He made two trips to Florida, one in February, 1973, the other over the New Year period in 1973. (T 340) Truscio paid for these tickets; they were not a gift. (T 340 - 341)

THE TICKET USERS

Michael Milrod utilized United Airlines tickets, Government Exhibits "14-A" and "14-B", on May 25th, 1973 to fly from New York to San Diego, from San Diego to Los Angeles and from Los Angeles to Las Vegas; thence to New York.[9] (T 151) He obtained the tickets for himself and his ex-wife at a discount through Matilda Hoffman, the witness' ex-wife's aunt, from her store in Brooklyn two weeks immediately prior to the Memorial Day weekend. (T 152 - 153, 155 - 156)

Milrod denied he knew the tickets were stolen. (T 157) He was assured that discounting up to 50 per cent was proper because ". . . it is a friend of mine [Matilda Hoffman] who can get me a good deal through a travel agent." (T 157)

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[9] Mr. Milrod paid $350 in cash for the two airlines tickets which had a face value of $347.73 and $350 respectively. (T 153)

Milrod had never before obtained a 50 per cent discount on airlines tickets; he always paid full value. (T 160) He learned he had utilized stolen airlines tickets when the Port Authority Police contacted him upon his return from the West Coast. (T 165) He adhered to this posture notwithstanding his persistent questioning of Matilda Hoffman to insure that the tickets were proper and that, while in San Diego while changing the date of a flight, the ticket agent noted that the tickets did not reflect the payment of the security charge and the tax on the tickets. (T 167 - 169) Mr. Milrod denied he was advised to deny that had knowledge that the tickets were stolen. (T 170 - 171)

Mona Norotsky, Michael Milrod's ex-wife, paid her aunt cash for the airlines tickets and picked them up at her store on Church Avenue near Ocean Parkway in Brooklyn. (T 183 - 183a) The witness did not suspect there was anything wrong with the discounted airlines tickets. She had no reason to suspect that they were stolen. (T 184)

The witness wasnot given any instructions from her aunt concerning the use of the airlines tickets. (T 188) She first realized she might have a problem stemming from the use of the

tickets when the F.B.I. contacted her. (T 192) Following contact with the F.B.I., Miss Norotsky contacted her aunt to find out where the airlines tickets had come from. She was told they had been obtained "through a friend in the beauty parlor." (T 195)

Beverly Flaum testified in April, 1973, that she, her husband, two daughters and son travelled round trip from New York to Miami. (T 200) The tickets were purchased at the "Tom Jones" beauty parlor on Church Avenue in Brooklyn. (T 205 - 206) She received a substantial discount on the ticket purchased, paying well below the face value of the tickets. (T 209)

Hilda Hoffman testified that Larry Truscio, a hairdresser at the Tom Jones Beauty Parlor, mentioned to her the possibility that airlines tickets could be obtained at a discount. (T 217) The purchase of airlines tickets was arranged at a 30 per cent discount of the face value of the tickets. (T 220 - 222) In discussing the possible purchase of discounted airlines tickets with family members, she did not recall specifying that ticket purchases had to be made with the payment of cash. (T 223) She paid Larry Truscio for the Norotsky's airlines tickets to California. (T 223)

Irving Gallina, Larry Truscio's father-in-law, testified that he and his wife purchased discounted airlines tickets from his son-in-law for a July, 1973 round trip flight from New York to Miami. (T 227 - 228, 229) At the time he obtained the tickets, Mr. Gallina was unaware that they had been stolen. (T 229)

Casper Curzio, a detective employed by the New York City Police Department, testified that he made arrangements to travel to Ireland in August, 1973 with his wife, mother-in-law, and children. (T 236) The airlines tickets for the planned trip to Shannon Airport were obtained through Detective Curzio's partner, Harold Altman and not from an airline or travel agent. (T 236) The latter had assured Curzio that he had a friend who was working as a salesman with a ticket agency who could obtain the tickets - the friend was Larry Truscio. (T 237 - 238) The tickets were obtained for $1,800 cash through Altman. (T 239) Detective Curzio was under the impression that the ticket purchase was entirely proper. (T 244) Only upon arriving at the airport did Curzio learn that the tickets would not be honored and that the trip would not be consummated. (T 246)

Detective Curzio never received a refund for the bogus airlines tickets. (T 246 - 247) He never even attempted to recover the lost $1,800. (T 247)

Joan Serrano testified that she and her husband Victor and the Appellant and his wife travelled together to Puerto Rico in February, 1973. (T 367) The Gallos travelled under the name of "Bruno". (T 370) The Appellant told Mrs. Serrano that he used the name "Bruno" lest he be associated with the notorious gangster "Gallo" family. (T 373) The reservation form at the hotel where the two couples stayed, the El San Juan, revealed that the Appellant registered and was billed under the name of Gallo. (T 373, 376 - 377) Mrs. Serrano did not believe that Mr. Serrano had paid for the Serrano's air fare. (T 379)

Cheryl Speering Pellegrino testified that in the Summer of 1973, she travelled to the Jamaica, West Indies "Playboy Club" Hotel with the Appellant who was then separated from his wife. (T 381 - 382, 385) The Appellant paid all the expenses of the trip, including the round trip airfare. (T 383)

Robert M. Kanne, the Circulation Director for the Rubin H. Donnelly Corporation, an airlines publication concern, testified that Jack Gallo's clothing store, "Mark V, Ltd.", was a

subscriber to two editions of the Donnelly Corporation's official airlines guides, both the North American Division and the International Division. The subscription was in effect for one year, from May, 1973 until April, 1974. (T 330) These two publications show the fares and schedules for all airlines and are utilized by all branches of the travelling business community for scheduling flights and computing the current price of airlines tickets. (T 331) There are 170,000 subscribers to the North American Division. (T 331) New editions appear every two weeks due to fluctuation of airline ticket prices. (T 334)

Morton Wolberger, an employee of Central Tours, Inc., a travel agency located in mid-Manhattan, was shown Government Exhibit "14-A". He testified that the validating stamp which appeared to reflect that the ticket was issued by his agency, was a fraudulent one. (T 483) He denied that his travel agency ever issued or validated the ticket in question. (T 485) Mr. Wolberger likewise insisted that Government Exhibits "10-A", "10-B" and "10-C" were also neither issued nor validated by Central Tours. (T 486)

At the conclusion of all the evidence, the defense moved to dismiss each count of the Indictment on the ground that the

Government had failed to establish a prima facie case. Judge Judd denied the Motion.

THE CHARGE

Following closing statements by both sides, the Court charged the jury on the applicable law. He instructed the jury concerning the elements of Title 18, United States Code, Section 659. On the all-important question of knowledge, the Court remakred:

> "Fourth, and this is one of the really important parts of it, that he knew that the goods were stolen, and this involves a determination of knowledge, which is a state of mind, but knowledge is something that jurors can infer from circumstantial evidence; and if a person closes his eyes to facts which would definitely put him on inquiry, you will find that that is the equivalent of knowledge." (A 43)

In discussing the giving of handwriting exemplars, the Court charged the jury that such evidence does not violate the privilege against self-incrimination. While the Court observed that Gallo's submission to exemplars was a factor to be considered in deciding the question of guilt, he then told the jury:

> "[I]f he [Gallo] had not voluntarily submitted [exemplars] he may have been compelled to provide the exemplars, and you

could consider that in bearing on it [consciousness of guilt]" (A 46)

In commenting upon the testimony given by Mr. Oberg, the Government's handwriting expert, the Court remarked:

> "I would say that I don't think there is any grounds to criticize him [Mr. Oberg, the handwriting expert] because he didn't reach a conclusion on the first set of specimens [relative to count 8]. You may consider that as affecting his credibility. You may consider it as being an element of caution, with a man's liberty at stake. He wanted to have as precise comparisons as he could before expressing an opinion, or you may say that he just wanted to have enough so he could nail this guy." (A 52 - 53)

At the conclusion of the Court's charge, the jury began its deliberations. The jurors ultimately returned a verdict convicting Gallo of counts one, two, four, five, six, seven and eight and not guilty of counts three and nine. (A 65) On August 1st, 1975, Judge Judd sentenced Gallo to one year's imprisonment on each count, the sentences to run concurrently.

The Appellant is presently at liberty on bail pending the determination of appeal under the terms and conditions established by the Trial Judge.

STATUTES INVOLVED

Title 18, United States Code, Section 659, states in pertinent part as follows:

> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or . . ."
>
> "Shall in such case be fined not more that $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Rule 52 of the Federal Rules of Criminal Procedure states as follows:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

QUESTIONS PRESENTED

1. Was the Court's charge on criminal intent so unbalanced and legally inadequate as to deny the Appellant of a fair trial?

2. Were certain comments during the Court's charge legally inappropriate and prejudicial thereby denying the Appellant of a fair trial?

3. Did the Court err when it ruled that evidence of prior similar criminal acts could be admitted as part of the Government's direct case?

POINT I

THE COURT'S FAILURE TO RENDER A BALANCED CHARGE ON CRIMINAL INTENT DEPRIVED THE APPELLANT OF A FAIR TRIAL.

Any appellate attack upon a judge's charge must be made and analyzed with the realization that:

> "Although jurors are far less sensitive than computors to nuances in instructions, an erroneous charge by a trial judge may affect the jury in unaccountable ways and, in some instances, a defendant may be deprived of vital procedural safeguards."

United States v. Barry, --- F.2d --- (2nd Cir., June 18, 1975) sl.op. p.4117, 4118.

In this regard and with this caveat in mind, we contend that the Court's cryptic instructions concerning the Government's burden of proof on the contested issue of criminal intent, was inadequate to the Appellant's detriment and denied him a fair trial. The fact is, and the record confirms that the Court's sole acknowledgment of the Government's burden of proof was as follows:

> "Fourth, and this is one of the really important parts of it, that he knew that the goods were stolen, and this involves a determination of knowledge, which is a state of mind, but knowledge is something that jurors can infer from circumstantial

> evidence; and if a person closes his eyes to facts which would definitely put him on inquiry, you will find that that is the equivalent of knowledge."

While there is nothing per se reversible about such a charge, which emphasizes a claim that the accused may not act with a reckless disregard of the fact that an instrumentality is stolen and with a conscious purpose to avoid learning the truth, this Court has constantly emphasized the propriety of such charges only in cases where the charge on the question of criminal intent is balanced and the "reckless disregard" portion does not exist in isolation. United States v. Bright, 517 F.2d 584, 587 (2nd Cir., 1975).

Problems with "reckless disregard" charges on criminal intent are, of course, not new to this Court. In United States v. Jacobs, 475 F.2d 270, 287-288 (2nd Cir., 1973), cert. den'd. sub. nom.; Lavelle v. United States, 414 U.S. 821 (1973), this Court affirmed the District Judge Gurfein's charge because it was a balanced charge and did not leave the "reckless disregard" portion of the charge to stand in isolation. See, also, United States v. Brawer, 482 F.2d 117, 128 (2nd Cir., 1973); but see United States v. Fields, 466 F.2d 119, 120-121 (2nd Cir., 1972).

The Government was charged with the statutory obligation

to prove not merely the possession of the stolen airlines tickets, but possession with the knowledge that they were stolen. Judge Judd's legal instruction was defective not merely because the "reckless disregard" portion was charged in the manner of isolation which this Court has stated is legally unacceptable, but rather because this charge was used in the teeth of a total denial of any possession. However appropriate the charge on "reckless disregard" may be where possession is admitted or not seriously contested, it should not be charged when possession is denied. By rendering such a charge, the Court conveyed the notion that the evidence had already revealed Gallo's possession and that the real question was his intent. This, of course, was not case; both possession and criminal intent were denied. Thus, the rendering of this unbalanced charge aided the Government, worked great prejudice to the defense and confused the issue at trial. The rendering of such an unbalanced charge was certainly plain error. Federal Rules of Criminal Procedure, Rule 52(b); United States v. Vaughan, 443 F.2d 92, 94-95 (2nd Cir., 1971); United States v. Fields, supra.

POINT II

THE COURT ERRED IN ALLOWING PROOF OF CRIMES NOT CHARGED IN THE INDICTMENT AS EVIDENCE IN CHIEF.

Although he was only charged with nine claimed violations of Title 18, United States Code, Section 659, the Government sought to introduce, and Judge Judd allowed, evidence that the Appellant's handwriting appeared on some four hundred other stolen airlines tickets which were the subject matter of six separate air cargo thefts. In ruling in favor of the Government on the side of admissibility, the Trial Court took the position that if evidence of uncharged crimes was relevant for any purpose, that he would allow its introduction as substantive evidence in chief. We contend that this was error not merely because the predictably prejudicial impact which arises from the introduction of evidence charging an accused with additional 400 crimes, but because there is no showing during the colloquy between the Court and counsel that the Trial Court ever sought to balance the probative value of admissibility against the prejudicial character of exclusion.

The law within this Circuit is clear that evidence of prior similar acts is admissible if offered for a legal purpose

other than to show the criminal character of the accused. United States v. Deaton, 381 F.2d 114, 117 (2nd Cir., 1967); United States v. Brettholz, 485 F.2d 483, 487 (2nd Cir., 1973), cert. den'd. 415 U.S. 976. As a condition precedent, however, the District Judge is charged with an affirmative duty to balance probative value against prejudicial impact.

The task required is specifically set forth by this Court in United States v. Deaton, supra at p.117:

> ". . . the trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudical character."

See, also, Spencer v. Texas, 385 U.S. 554, 561 (1967); United States v. Brettholz, supra; Mc Cormack on Evidence, Sec. 190 (2d. Ed. 1972)

A fair reading of the minutes reveals that Judge Judd never applied the "Deaton-Brettholz" balancing test which this Court has required. Rather, he simply ascertained that the Government had a valid basis for seeking admission of the uncharged crimes. This narrow approach in a potentially prejudicial domain is legally insufficient to discharge the obligation

imposed under the balancing approach required in this Circuit.

There can be no doubt but that the determination to permit the jury to hear that documentary evidence showed Gallo to be implicated in hundreds of other violations of Title 18, United States Code, Section 659 had a dramatic impact upon the fact-finding process. In a case where the criminal intent required is knowledge that an instrument is stolen, and where two New York City Police Officers (Detective Altman and Detective Curzio) obviously believed that these airlines tickets were valid, the jury was painted an improper picture of an accused, if only because of the vast number of tickets, who "had to know" that he was dealing in stolen property.

In a case as evidentiary "then" as this one, where the jury's disbelief of the alleged accomplice Truscio is manifest,[11] the admission of this staggering number of uncharged crimes must have had an impact upon the fact-finding process well beyond the limited purpose for which they were admitted. In such a

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[11] The jury only convicted where Truscio's testimony was corroborated by documentary evidence. Thus, the accused was acquitted of two of the nine counts charged.

posture, their admission was error which deprived the Appellant of a fair trial. As such, a remand for a new trial, at which the evidentiary balancing test will be applied, is required.

POINT III

THE TRIAL COURT DENIED APPELLANT A FAIR TRIAL BY THE INTERJECTION OF COMMENTS WHICH WERE FAVORABLE TO THE PROSECUTION AND HOSTILE AND PREJUDICIAL TO THE DEFENSE.

Although we recognize and brook no issue with the long-accepted practice that "[A] trial judge conducting a case before a jury in the United States court is more than a mere moderator. . .", United States v. Brandt, 196 F.2d 653, 655 (2nd Cir., 1952); United States v. Hendrix, 505 F.2d 1233, 1237 (2nd Cir., 1974), he may surely intervene and play an active role in the trial to insure the proper development of issues, the clarification of testimony and that the trial is fairly conducted. United States v. Curcio, 279 F.2d 681, 682 (2nd Cir., 1960), cert. den'd. 364 U.S. 824.

A caveat, however, attaches to the adoption of such an activist judicial posture. The trial judge must not interfere for a merely partisan purpose or permit even the appearance of such an interference. United States v. Fernandez, 480 F.2d 726, 738 (2nd Cir., 1973). If a consideration of the tiles which form the composite of Appellant Gallo's trial are considered, United States v. Nazzaro, 472 F.2d 302, 304 (2nd Cir., 1973),

it is inescapable that Judge Judd's sua sponte comments during his charge to the jury clearly oversteps the proper bounds within which a trial judge may venture.

* * *

During defense counsel's cross-examination of the Government's handwriting expert, Mr. Oberg, it was elicited that his first comparison of the airlines tickets, the unlawful possession of which formulated the basis upon which count eight in the Indictment was predicated, and the handwriting exemplars voluntarily supplied by Gallo, did not permit a finding that the tickets were, in fact, written by Gallo.

The defense sought to suggest, and quite properly so, that the Government had concluded that Gallo had prepared these tickets and so would continue to bombard its expert with sufficient exemplars until he was prepared to join with the analysis of his superiors. The Government, of course, clearly had the right to argue in its closing statement to the jury that this was not its intent, rather, the prosecutors, as quasi-judicial officers, charged to see that justice is done, were only trying to insure the most careful of scientific analysis.

With this evidence presented in this light, with the

inferences which flow so diametrically contrary, we contend that Judge Judd passed beyond the veil of judicial neutrality by stating:

> "I would say that I don't think there is any grounds to criticize him [Mr. Oberg] because he didn't reach a conclusion on the first set of specimens. You may consider that as affecting his reliability. You may consider it as being an element of caution, with a man's liberty at stake. He wanted to have as precise comparisons as he could before expressing an opinion, or you may say that he just wanted to have enough so he could nail this guy. As I say, a Government witness is judged by the same standards of credibility, agents are judge by the same standard of credibility as other witnesses. The defendant's counsel said it was an insult to your intelligence to present the second report after the first one. I think you should regard that as highly verbal exaggeration by counsel. I did not consider it an insult to my intelligence. I considered the finding. The evidence that Mr. Oberg was not able to reach a definite conclusion on the marked exemplars, the credibility of the expert leaving it for you to decide on the basis of the facts." (A 52 - 53)

The clear import which may be derived from these remarks is that not only was there nothing ominous relative to the Government's multiple demands for handwriting exemplars, but that any contrary suggestion by defense counsel was, at best, frivolous and, at worst, not in good faith. We submit that it

was unfortunate and improper for Judge Judd to instruct the jury that the expert was only seeking to be careful. The reasons and need for multiple exemplars was relevant and probative of Mr. Oberg's credibility and the Government's prosecutorial focus. The addition of a judicial "seal of approval" could only work to the detriment of the defense in seeking to undermine Mr. Oberg's credibility. The jury could only infer that Mr. Oberg acted properly and was accurate in his handwriting analysis. The usurption of a jury function by the trial court requires a vacature and new trial.

Were this the sole instance of pro-prosecution judicial comment, its denomination as harmless error might be a viable posture. Sadly, this comment did not stand alone.

A strong base of Jack Gallo's defense that he did not possess the subject stolen airlines tickets was his voluntary appearance at the prosecutor's office on some three separate occasions to provide voluminous handwriting exemplars. While it may be contended, and we do not disagree, that there is no Fifth Amendment[10] basis upon which an accused may bottom his

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[10] There may well be, of course, a Fourth Amendment right to refuse to cooperate. Davis v. Mississippi, 394 U.S. 721 (1969).

refusal to cooperate, the record does not reflect that Gallo sought to thwart the Government's access to the desired exemplars or, indeed, even knew he could attempt to resist such a posture. The Court's comment that Gallo had no right to refuse to provide the exemplars while perhaps a correct statement of the law, was clearly a comment unrelated to the testimony in the record or Gallo's state of mind.

The defense sought to use Gallo's posture of cooperation as an affirmative basis for negating any unconsciousness of guilt and hence to meet the claim that the possession of airlines tickets was with the knowledge that they were stolen. Judge Judd's comment, in the presence of the jury, served not merely to deflate a valid mosaic in the overall defense, but was unrelated to any evidentiary showing that the accused was so aware. As such, the comment was highly improper and either standing alone or in conjunction with the other errors of the trial, mandates that a new trial be ordered.

CONCLUSION

The Judgment of Conviction appealed from should be reversed and remanded to the District Court for a new trial.

Respectfully submitted,

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